83-496

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1983

HARRY J. WILFORD, EVERETT G. DAGUE, HERMAN CASTEN and HERMAN B. BOEDING,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether union representatives are guilty of extortion under the Hobbs Act, 18 U.S.C. 1951, because they solicit and accept applications for membership and the ordinary fee for membership in the union from non-union truck drivers, after they have been prevented from unloading their cargo at a construction site where only union workers are employed.

PARTIES TO PROCEEDING

All parties to this proceeding are listed in the caption.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 710 F.2d 439. It appears in the appendix hereto.

The jugements of the United States District Court for the Northern District of Iowa were not reported. They appear in the Appendix hereto.

JURSIDICTION

The judgment of the United States Court of Appeals was entered on June 22, 1983. Petitioners timely filed a petition for rehearing en banc on July 6, 1983, which was denied on August

1, 1983, and this Petition is being filed within sixty (60) days of that date. By order of the Court dated August 24, 1983, the mandates were recalled and stayed for thirty (30) days to permit filing of this Petition. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes: 18 U.S.C. Section 1951; 29 U.S.C. Section 186(b)(1)(2) and (d) and 18 U.S.C. Section 2. The pertinent text of these statutes is set forth as Appendix G.

STATEMENT OF THE CASE

Petitioners were representatives of Chauffeurs, Warehousemen and Helpers of America Local Union No. 238, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Local 238 was located in Cedar Rapids, Iowa. Petitioner Wilford was the secretary/treasurer and chief executive officer of Local 238; Dague and Casten were business agents for the local; Boeding was a union member.

All petitioners were convicted of conspiracy to obtain property by extortion in violation of the Hobbs Act, Title 18 U.S.C. 1951, and various misdemeanor offenses of unlawfully demanding or receiving money on behalf of a labor union in violation of the Labor Management Relations Act, 29 U.S.C. 186(b)(1) and of demanding or accepting a fee for the unloading of a vehicle employed in commerce in violation of 29 U.S.C. 186(b)(2) and 18 U.S.C. 2. The charge of receiving money on behalf of a labor union in violation of 29 U.S.C. 186(b)(1) arose from instances where the general contractor advanced money to the driver or on his behalf to join the union. The charges of demanding or accepting a fee for unloading in violation of 29

U.S.C. 186(b)(2) and 18 U.S.C. 2 involved the $49.00 paid and received to join the union. Dague, Casten, and Boeding were also convicted of other substantive counts of extortion in violation of 18 U.S.C. 1951. The Petitioners were fined on each count on which they were convicted and received concurrent suspended sentences on some of the counts.

Petitioners' indictment and convictions stem from problems non-union truck drivers experienced making deliveries at a site in Cedar Rapids, Iowa, where a water pollution control facility was being constructed by Darin & Armstrong, the general contractor, and its sub-contractors. All of the workers on the construction project belonged to craft or trade unions and were working according to collective bargaining agreements arrived at between their respective unions and the general contractor and sub-contractors. At the time, Local 238 and Darin & Armstrong were operating under a collective bargaining agreement which in pertinent part gave the members of the union the right not to work with non-union persons employed on work coming within the scope of structural building work or operations or on any non-union work coming within the jurisdiction of the union.[1] The agreement also stated truck driving to be the jurisdiction of the Teamsters Union and provided that a truck driver or drivers must be on the job at all times a truck or trucks were on the job.[2] Truck drivers delivering material to the construction site were regularly asked by the Petitioner Boeding, an employee of

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[1] **RIGHTS OF UNION MEMBERS**

No member of the Union shall be required to work with a non-union man or men employed on work coming within the scope of structural building work or operations or on any non-union work coming within the jurisdiction of this Union.

[2] **JURISDICTION OF WORK**

All truck driving is the jurisdiction of the Teamsters Union. The parties agree that there shall be a truck driver or drivers on the job at all times that a truck or trucks are on the job.

Darin & Armstrong and a member of Local 238, or construction workers belonging to other craft unions to show their union identification. If they were members in good standing of any teamster local, their cargo was unloaded by the appropriate construction workers at the job site. If they didn't belong to a union or were not in good standing with their local union, the construction workers responsible for unloading their cargo would refuse to do so. Unloading of trucks delivering material to the construction site was not within the jurisdiction of the teamsters.

The non-union truck drivers, faced with the consequences of not being able to deliver their cargo at the construction site, decided to join Local 238. Thereafter, either the Petitioner Dague or Casten, business agents of Local 238, came to the construction site, where they accepted membership applications and the initiation fee plus one month's dues, a total of $49.00, from the drivers. The drivers were given a hand-written receipt. All dues and initiation fees went to the union, and the driver later received from the Local a computer-printed receipt and a membership card in Local 238. While some of the drivers thereafter retained the union membership by paying dues or electing to be designated as inactive, most of the drivers did not consider themselves members of the union and did nothing further to continue their membership.

None of the Petitioners benefited personally from this activity. No force, threat of force or violence, direct or implied, was made by any of the Petitioners. Consistent with the evidence in the case, the issue of extortion was submitted to the jury by the Court entirely on the basis of the ". . .wrongful use of actual or threatened fear of economic loss. . . ."

The activities described above began in early 1977 and continued until April 1978, when a National Labor Relations Board investigation began as a result of a complaint filed by a driver. After the NLRB commenced suit to enjoin Local 238 from continuing its practices, Local 238 entered into a settlement stipula-

tion agreeing to terminate such practices and refunded membership fees to certain selected drivers. No violation of the settlement stipulation was claimed. Nevertheless, on September 23, 1981, a 16-count indictment was filed against the Petitioners.

Petitioners appealed their convictions to the United States Court of Appeals for the Eighth Circuit assigning as error the trial Court's refusal to grant a judgment of acquittal on the six counts alleging violations of the Hobbs Act, 18 U.S.C. 1951. Petitioners asserted their actions as union representatives did not constitute extortion within the intent and meaning of the Hobbs Act.

Petitioners' convictions were affirmed by the Court of Appeals in an opinion filed June 22, 1983. Petitioners' request for rehearing and suggestions for rehearing en banc was denied. However, three judges noted that they would grant the petition for rehearing en banc.

REASONS FOR GRANTING THE WRIT

Certiorari Should Be Granted Because The Decision Of The Court Of Appeals Conflicts With And Seriously Undermines The Exemption Afforded Labor Unions By This Court's Decision In *U.S.* v. *Enmons.*, 410 U.S. 396 (1973), From The Reach Of The Hobbs Act, 18 U.S.C. 1951, When Pursuing Traditional Or Legitimate Labor Goals.

The broad issue meriting the granting of the Writ of Certiorari is one of first impression, presenting an atypical factual situation for prosecution under the Hobbs Act. The decision of the Court of Appeals if not modified by this Court will extend the Hobbs Act such that any violation of the National Labor Relations Act will be a violation of the Hobbs Act, contrary to the legislative intent of the Hobbs Act and contrary to the decision of this Court in *U.S.* v. *Emmons*, 410 U.S. 396 (1973).

The actions of the Petitioners on behalf of Local 238 which precipitated this prosecution involve traditional union activity. Local 238's goal of organizing non-union truck drivers was a legitimate union interest. The receipt of initiation fees and dues from members to enhance the common treasury is also a legitimate labor goal. Enforcement of collective bargaining agreements and exercising rights believed to be secured therein are also traditional legitimate activities of labor unions.

In *U.S.* v. *Russo*, 708 F.2d 209 (1983), Judge Holschuh in his opinion, concurring only in the results, clearly summarizes Petitioners' claim before this Court, to wit:

> The important point is that neither the Anti-Racketeering Act nor the Hobbs Act was intended to make criminal the use of violence or threats of economic loss if such activities had a legitimate labor goal, e.g., procurement of jobs involving bona fide and substantial services or obtaining increased wages or better working conditions. The means used to obtain such goals may well constitute

an unfair labor practice under the extensive federal acts governing the conduct of labor, and the use of violence to obtain such goals may be punishable as a crime under local statutes. However, insofar as the Hobbs Act is concerned, its legislative background reveals no intention of Congress to impose the severe criminal sanctions of that Act upon activities of labor aimed at achieving a legitimate labor objective.

The Hobbs Act was a legislative response to the Supreme Court decision in *U.S.* v. *Local 807,* 315 U.S. 521 (1942). In *Local 807,* the Court held that Section 2 of the Anti-Racketeering Act of 1934 (predecessor of the Hobbs Act), provided an exception to covered members of the New York City Truck Drivers Union who, by violence or threats, exacted payments for themselves from out-of-town truckers in return for the unwanted and unneeded service of driving out-of-town trucks to and from the city. The Hobbs Act, enacted in 1946, removed from the Anti-Racketeering Act, Section 2, which was the wage exception, and also Section 6, which was the waiver exception. The new act was designed specifically to prevent the use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce. See comments of Congressman Hancock quoted in *U.S.* v. *Enmons,* 410 U.S. 396, 403.

The facts of this case are far from the classic Hobbs Act violation. Under a classic Hobbs Act violation there is generally an individual, normally a union officer, who uses his position of power as a means to exact some form of personal gain from another individual, usually an employer. They deal with personal payoffs for removal of pickets, see *U.S.* v. *Quinn,* 514 F.2d 1250 (5th Cir. 1975), forcing of an employer to retain a favored lawyer, *U.S.* v. *Provenzano,* 334 F.2d 678 (3rd Cir. 1964), personal payoff to assure a labor peace, *U.S.* v. *Arambasich,* 597 F.2d 609 (7th Cir. 1979). There are many cases in

this vein, however a thorough reading of all the labor related cases fails to find a case with a fact situation similar to the one at bar.

The legislative history has many references to the fact that the Hobbs Act will in no way affect legitimate union objectives. Representative Jennings from Illinois stated at page 11902, 91 Congressional Record, that:

> This bill by express terms leaves in full force and effect every law upon the statute books passed for the protection of the legitimate rights of labor.

In *Enmons,* footnote 16, at page 407, stated:

> The proponents of the Hobbs Act define the Act as no encroachment on the legitimate activities of labor unions on the ground that statute did no more than incorporate New York's conventional definition of extortion—" the obtaining of property from another ... with his consent induced by a wrongful use of force or fear or under color of official right."

Representative Voorhees of California stated in 91 Congressional Record at 11908:

> That nothing in the Act shall be construed to repeal, modify, or affect the National Labor Relations Act, and since the National Labor Relations Act was passed for the express purpose of protecting the right of collective bargaining, it appears to me it would be utterly impossible to construe this bill as affecting the collection of union dues or the collective bargaining activities of a labor organization . . . and certainly demands for higher wages or attempts to collect union dues are not unlawful acts by any stretch of the imagination.

In essence, what must be determined to bring an act within the exception of the Hobbs Act, is a determination that a par-

ticular act is within the legitimate union objectives. Representative Hobbs at page 11901 of the 91st Congressional Record stated that:

> When you are picketing, when you are striking, when you are organizing a labor union, or engaging in any legitimate labor function, then you are operating under some one of those four laws that are specifically exempted in this bill by Title III.

So it may be said from this comment by Mr. Hobbs himself, that a legitimate labor objective will encompass practices such as striking, picketing, and organizing. The Court in *Enmons* stated at page 404 that:

> By eliminating the wage exception to the Anti-Racketeering Act, the Hobbs Act did not sweep within its reach violence during a strike to achieve legitimate collective bargaining objectives. It was repeatedly emphasized in the debate the bill did not "interfere in any way with any legitimate labor objective or activity."

In *Enmons*, the Court characterized illegitimate objectives as those by which employees or their representatives exact *personal payoffs, or pursue wages for unwanted or fictitious services. Enmons* at page 407. In footnote 16 of *Enmons*, the Court quoted from the case *People* v. *Dioguardi*, 168 N.E.2d 683:

> The picketing here may have been perfectly lawful in its inception assuming it was part of a bona fide organizational effort and may have remained so despite its potentially ruinous effect on the employer's business—so long as labor was employed to accomplish the legitimate labor objective of organization. Its entire character changed from legality to criminality, however, when it was used as a pressure device to exact the payments of money as a condition of its cessation. In short, when the objectives of the picketing changed from legitimate labor ends to personal payoffs, then the actions became extortionate.

When speaking in terms of legitimate union "activities", "objectives", and "ends", one cannot construe legitimate as that being legal or illegal. Congressman Hobbs at page 11901 of the 91st Congressional Record stated that robbery and extortion are in no way legitimate activities of organized labor. The better word, perhaps, is traditional or customary. If one were to construe legitimate as being that which is right or wrong, or legal or illegal, then the statement by Representative Hobbs would have no effect. It is true robbery and extortion would not be legitimate activities of organized labor, but that would imply that it would not be legitimate activities for some other group. That cannot be what the meaning of legitimate is intended to be. Legitimate, or traditional objects of labor are those stated above. Likewise, picketing can be illegal, but it also is a legitimate activity of labor. Organization or solicitation of members can be illegal or wrong, but like striking and picketing it is a traditional and legitimate union objective. This is the exact rationale of *Enmons.* The destruction of the transformers was clearly not legal, yet the objective, in that it was in furtherance of a lawful economic strike was to achieve a legitimate labor end (i.e., a collective bargaining agreement).

In the case at bar, the Defendants were seeking enforcement and/or compliance with the collective bargaining agreement. They were seeking to enforce a clause of the contract that had been negotiated and agreed to by the employer. They were not lawyers, and they had no reason to believe the clause was invalid. Thus, although their action may have been misguided, they were seeking the legitimate labor end of compliance with a collective bargaining agreement.

The fact pattern of this case was dealt squarely with in the legislative history. In an exchange between Representative Eberharter and Representative Hobbs it was stated:

> MR. EBERHARTER. I am asking this question for information. It has been said by some opponents of this

measure *that if in the exercise of legitimate union activities and in connection with organizing a group of persons or individuals who are not members of a union, a truck, for instance, may be stopped.* Which truck is engaged in interstate commerce, then they would be subject to penalties imposed by this Act. *In other words, they would be accused of attempting by threat, force, violence, or intimidation to extort money, whereas the intention may be only to convince the non-union persons that he ought to join the union.* If the gentleman would clarify that I think it will be helpful.

MR. HOBBS. *There is not a thing in the world to that statement.* Title III of this bill exempts from the operation of this law any conduct under the antitrust statutes, under the NLRB Act, under the Norris-LaGuardia statute, the Railway Labor Act, the Big Four that thave been termed the Magna Carta of labor. In addition, that cannot be seriously contended except as just a window dressing in opposition to this bill because there is nothing clearer than the definitions of robbery and extortion in this bill. They have been construed by the courts not once, but a thousand times. The definitions in this bill are copied from the New York City Code substantially. So there cannot be any serious question along that line by the gentlemen from New York who are the leaders of the fight against the bill.

Let me point out that when you are striking, when you are picketing, when you are organizing a labor union, or engaging in any legitimate labor function, then you are operating under some one of those four laws that are specifically exempted in this bill by Title III. Aside from that there is absolutely nothing farther from the mind of any proponent of this bill than to hurt labor. Did we amend this bill when the Teamsters' Union struck in Washington? Not at all, no matter how much it hurt. It was not highway robbery. They were exercising their

> legitimate right to strike. The same thing is true of all the other legitimate activities of Labor, and I resent just as bitterly as you or anybody else does the aspersion cast upon organized labor that robbery and extortion are legitimate activities of organized labor. You do not believe that, I do not believe that, nobody does. (91 Congressional Record 11900, 11901 [1945]).

This exchange supports our contention that the type of act which the Defendants were convicted of, i.e. organization/solicitation of members, is excluded from the Hobbs Act as that which is a legitimate or traditional union objective. The Defendants did nothing more than that which is considered traditionally a union function.

The National Labor Relations Act encompasses all of the rules to which management and labor must adhere in order to function properly. Traditional labor activities which are carried out in a way which does not conform to the NLRA are to be prosecuted under the NLRA and not the Hobbs Act. In *Enmons,* the acts of violence were violative of Section 8(b)(1)(A) of the Act. In this case, Defendants' actions as alleged in the Indictment are violative of the NLRA, but not of the Hobbs Act. The above-cited legislative history quotes to the Hobbs Act demonstrate that proponents of the Hobbs Act did not intend for the legislation to reach those activities which are traditionally labor related such as organization and solicitation of members. Under the NLRA the NLRB is empowered to remedy those violations.

The government is attempting to expand the Hobbs Act far beyond its intended scope. As the Supreme Court stated in *Enmons:*

> Even if the language and history of the Hobbs Act were less clear than we have found them to be, the Act could not properly be expanded as the government suggests—for two related reasons. First, this being a criminal statute, it must

> be strictly construed, and any ambiguity must be resolved in favor of leniency. Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the federal government in the business of policing the orderly conduct of strikes. *Enmons* at page 411.

As that quote suggests, a criminal statute must be strictly construed. If this Court's decision is allowed to remain, then other acts by labor such as wildcat strikes, misguided organizational tactics, such as the ones in this case, and any other acts committed by a union, which run afoul of the NLRA and the literal interpretation of the Hobbs Act.

If the statutory exception to the Hobbs Act is to have any meaning at all, then a strict interpretation of the Act must be applied in this case. What is illegal under the NLRA is not necessarily an illegitimate labor objective; a finding of a violation under the NLRA means simply that the methods used by the labor organization were in time and place improper.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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September 23, 1983

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 82-1185, 82-1186, 82-1187 and 82-1188

No. 82-1185

United States of America,
Appellee,

v.

Harry J. Wilford,
Appellant.

No. 82-1186

United States of America,
Appellee,

v.

Everett G. Dague,
Appellant.

No. 82-1187

United States of America,
Appellee,

v.

Herman J. Casten,
Appellant.

No. 82-1188

United States of America,
Appellee,

v.

Herman B. Boeding,
Appellant.

Appeals from the United States
District Court for the
Northern District of Iowa.

Submitted: November 11, 1982

Filed: JUne 22, 1983

Before LAY, Chief Judge, HENLEY, Senior Judge, and ARNOLD, Circuit Judge.

LAY, Chief Judge.

Harry J. Wilford was convicted of conspiracy to obtain property by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976), three misdemeanor offenses of unlawfully demanding or receiving money on behalf of a labor union in violation of the Labor Management Relations Act, 29 U.S.C. § 186(b)(1) (1976), and five misdemeanor offenses of demanding or accepting a fee for the unloading of a vehicle employed in commerce in violation of 29 U.S.C. § 186(b)(2) (1976) and 18 U.S.C. § 2 (1976). Everett G. Dague was convicted of conspiracy in violation of 18 U.S.C. § 1951, four substantive counts of extortion, one count of unlawfully demanding or receiving funds on behalf of a labor union, and three counts of demanding or accepting

an unloading fee. Herman J. Casten was convicted of one count of extortion, one count of receiving funds on behalf of a labor union, and two counts of demanding or accepting an unloading fee. Herman B. Boeding was convicted of conspiracy in violation of 18 U.S.C. § 1951, five counts of extortion, three counts of unlawfully receiving funds on behalf of a labor union, and five counts of unlawfully demanding an unloading fee.[1] These appeals followed. We affirm.

Facts.

Wilford was the secretary/treasurer and chief executive officer of the Cedar Rapids, Iowa local (Local 238) of the Teamsters Union. Dague and Casten were business agents for the local. Boeding, unlike the other three defendants, was not an officer or an employee of the local; he was, however, a member of Local 238.

The defendants' indictment and convictions stem from their activities at a waste treatment construction site in Cedar Rapids. Darin and Armstrong, Inc. (D&A) was the general contractor at the site, and the defendant Boeding was employed by D&A as a truck driver on the site. Construction began in 1976. Sometime during that year, Boeding began stopping over-the-road trucks coming into the site to deliver materials, and "carding" the driver of each truck—asking him if he belonged to a union. If the driver belonged to a union, he was allowed to drive his truck onto the site and have it unloaded. If the driver indicated that he belonged to no union, Boeding informed him that his truck

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[1] Each defendant was sentenced to three years' probation and fined in an amount between $7,000 and $34,000.

would not be unloaded by anyone on the construction site[2] unless he joined Local 238. Most drivers, confronted with this choice, agreed to join Local 238 rather than leave the site without having their trucks unloaded. When a non-union driver agreed to join, Boeding would contact Dague or Casten, two of the union's business agents, at the union's offices. Dague or Casten would then come out to the site, fill in the driver's application for membership, request and accept a payment of $49 from the driver (for initiation fee and first month's dues), and provide the driver with a receipt. Later the union would mail the driver a computerized receipt and a membership card. As secretary and treasurer of the union, Wilford endorsed all checks received from the drivers, and signed the membership cards received by each driver.[3]

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[2] A collective bargaining agreement was in force at the D&A site, providing among other things that the construction would be done only by union members. Two fo the provisions of the collective bargaining agreement triggered much of the dispute at the construction site, according to the defendants. The first provision, article 11, stated:

RIGHTS OF UNION MEMBERS

> No member of the Union shall be required to work with a non-union man or men employed on work coming within the scope of sructural building work or operations or on any non-union work coming within the jurisdiction of this Union.

The second provision, article 19, stated:

JURISDICTION OF WORK

> All truck driving is the jurisdiction of the Teamsters Union. The parties agree that there shall be a truck driver or drivers on the job at all times that a truck or trucks are on the job.

[3] There also was adduced at trial evidence that Wilford was a "strong" union leader, and was aware of the other three defendants' activities at the D&A site.

On some occasions when a non-union driver either refused or was unable to pay the fee to join Local 238, a representative of D&A would pay the fee for the driver, in order to complete the delivery of the driver's materials to the site and avoid delays. At least one driver refused to pay the fee, and left the site without having been unloaded.

The National Labor Relations Board began investigating the situation at the D&A site in April 1978, after a non-union driver filed a complaint with the NLRB about the defendants' activities. Although the NLRB filed suit to enjoin the union's activities, the NLRB and the union eventually entered into a formal settlement stipulation in which the union did not concede that its members had committed any illegal acts, but agreed that its members wuld stop carding incoming trucks on the D&A site. The union also agreed to refund membership fees to several drivers.[4]

The NLRB then recommended to the Department of Justice that it investigate the conduct of the union officials for violation of criminal statutes. The Department's investigation resulted in a 16-count indictment against the defendants, charging them

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[4] The facts of this case evidence a practice similar to the one declared unlawful in *Shepard* v. *NLRB*, 103 S.Ct. 665 (1983). In *Shepard* a Teamsters local in San Diego entered into a master collective bargaining agreement with area contractors and contractors' associations. The agreement provided that only union truck drivers would be allowed to perform hauling services for building contractors in the San Diego area. The NLRB found that the agreement violated 29 U.S.C. § 158(e) (1976), and the court of appeals enforced the board's order. *Building Material and Dump Truck Drivers, Teamsters Local Union No. 36* v. *NLRB*, 669 F.2d 759, 765 (D.C. Cir. 1981). The Supreme Court affirmed, and held that the NLRB had discretion to decide whether to order reimbursement to drivers who had unwillingly joined the Teamsters in order to work with the contractors who had signed the agreement. 103 S.Ct. at 669.

with conspiracy and substantive violations of the Hobbs Act[5] and with violations of two provisions of the Labor Management Relations Act, 29 U.S.C. § 186(b)(1) and § 186 (b)(2).[6]

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[5] The Hobbs Act, 18 U.S.C. § 1951, provides in pertinent part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.
>
> (b) As used in this section—
>
> . . . .
>
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951.

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[6] Section 186 provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

I. The Hobbs Act Convictions.

A. The Substantive Charge.

The defendants argue that their conduct did not come within the definition of "extortion" in the Hobbs Act, 18 U.S.C. §

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(3) to any employee or group or committee of employees of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [49 U.S.C. 301 et seq.]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

29 U.S.C. § 186.

1951, and therefore that the trial court erred in denying the defendants' motion for acquittal of all Hobbs Act charges.[7]

In *United States* v. *Enmons*, 410 U.S. 396, 400-01 (1973), the Supreme Court held that "wrongful," as that term is used in section 1951(b)(2) to define "extortion," has meaning in the Hobbs Act "only if it limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." 410 U.S. at 400.[8] The Court concluded that the use of violence during the course of a lawful strike for higher wages was not prohibited by the Hobbs Act.

The defendants in this case argue that they were pursuing two legitimate labor objectives: (1) the defendants were enforcing their rights under the collective bargaining agreement in force at the D&A site, which stated that "[a]ll truck driving is the jurisdiction of the Teamsters Union"; and (2) the defendants were soliciting membership in the Teamsters Union and organizing those members. Because these were their objectives, and because these are "legitimate labor objectives," the defendants argue, they may not be prosecuted under the Hobbs Act, because their use of actual or threatened force, violence, or fear

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[7] The Hobbs Act was Congress' response to the Supreme Court's decision in *United States* v. *Local 807, International Brotherhood of Teamsters*, 315 U.S. 521 (1942). The genesis of the Act is outlined in *United States* v. *Enmons*, 410 U.S. 396, 401-03 (1973).

[8] In *United States* v. *Quinn*, 514 F.2d 1250 (5th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976), the court noted:

> [T]he effect of *Enmons* was to remove from the reach of federal criminal law the use of coercive tactics to obtain increased wages, but with the caveat that the prosecutor's hand would be stayed *only* when the payment is gained in furtherance of legitimate labor objectives.

Id. at 1257 (footnote omitted) (emphasis in original).

was not "wrongful."[*] The government counters on appeal that the defendants' actions "constituted an attempt to bolster Local 238's treasury by wrongfully taking money from transient truckers under the guise of obtaining 'union dues.' "

We need not decide whether the defendants' asserted objectives are "legitimate labor objectives." The evidence is sufficient to support the jury's conclusion that the defendants had no lawful claim to the money they received from the non-union drivers. In spite of the defendants' assertions as to what the objectives of their conduct were, there is evidence to support the jury's conclusion that these were not the defendants' true objectives. The jury expressly found all four defendants guilty of demanding and accepting and unloading fee in violation of 29 U.S.C. § 186(b)(2). Even though the defendants claim that one of their legitimate labor objectives was to solicit and organize members of the Teamsters Union, evidence showed that at least one new "member" was told that he would receive no union benefits in return for his payment except the opportunity to have his truck unloaded in the Cedar Rapids area. In addition, some of the non-union drivers were self-employed, and thus werepersons for whom the union could provide no real membership benefits, at least not in the areas of standardization of

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[*] It is well settled that the requisite "fear" under the Hobbs Act may be fear of economic loss. *E.g., United States* v. *Rabbitt*, 583 F.2d 1014, 1027 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *United States* v. *Quinn*, 514 F.2d at 1256. Several of the drivers who were required to join Local 238 testified that they or their employers would suffer economic loss if they were forced to take their cargo, unloaded, back to its point of origin or any place other than its slated destination, the D&A site.

wages and the representation of those drivers in a collective bargaining situation.[10]

The defendants also claim that by their actions they were attempting to enforce the provisions of the collective bargaining agreement in force at the D&A site. Two of those provisions stated in essence that no member of a union would be required to work with a non-union person, and that all truck driving would be the jurisdiction of the Teamsters Union. But the defendants' asserted objective is belied by the fact that non-union drivers were not allowed by the defendant Boeding to trade their loads with a union driver, and by the fact that the new "members" were not allowed to drive the trucks of other non-union drivers onto the site.

Thus, the jury reasonably could have concluded that among the defendants' objectives were to force non-union drivers to pay an unloading fee, and to force *all* non-union drivers, even self-employed drivers, to join, not just any Teamsters Union local, but Local 238 in Cedar Rapids, Iowa, regardless of whether the drivers' home or usual route of travel included Cedar Rapids. This constitutes a pattern of obtaining money through the use of fear, money to which the defendants had no lawful claim. We therefore conclude that the jury reasonably could find, and did find, that the defendants were guilty of extortion under the Hobbs Act because they obstructed, delayed, or affected commerce or the movement of an article of com-

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[10] To force a self-employed person to join a labor union is unlawful under 29 U.S.C. § 158(b)(4)(ii)(A) (1976).

In *United States* v. *Quinn*, 514 F.2d at 1259, the Fifth Circuit held that the fact that the defendant received money in violation of federal law made it clear that he had no lawful claim to the payment; "its receipt," the court concluded, "was statutorily declared not to be a legitimate labor objective." *Id.*

modity in commerce by using fear of economic loss to obtain property to which they had no lawful claim.[11]

B. The Due Process Claim — duplicative prosecution of misdemeanors under 29 U.S.C. ' 186(b)(2).

The defendants also argue that if their acts constitute extortion under the Hobbs Act, this results in a violation of their rights to due process, because, the defendants charge, the same factual nucleus that supports several of the Hobbs Act extortion charges also supports several of the misdemeanor charges.[12] The defendants urge that there must be a clear difference between conduct that supports a charge of a misdemeanor violation and conduct that supports a charge of an aggravated felony. In this case, the defendants contend, the same conduct is used in the indictment to support both the felony and misdemeanor counts.

The double jeopardy clause of the fifth amendment protects an accused against multiple punishments for the same offense. *Brown* v. *Ohio,* 432 U.S. 161, 165 (1977); *United States* v.

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[11] In *United States* v. *Porcaro,* 648 F.2d 753, 759-60 (1st Cir. 1981), the defendant argued that he was acting pursuant to his company's "inherent right" to enforce the terms of a management agreement between his company and the victims of the extortion. The defendant contended that because he was pursuing a legitimate end, the Supreme Court's ruling in *Enmons* protected him from prosecution under the Hobbs Act. The court of appeals disagreed, holding that the evidence showed that the defendant through his acts of extortion was not pursuing his stated objective.

[12] Specifically, count five of the indictment (extortion under the Hobbs Act) stems from the same incident as count 11 (demanding and accepting an unloading fee, a misdemeanor in violation of 29 U.S.C. § 186(b)(2)); count six (same Hobbs Act charge) stems from the same incident as count 13 (same misdemeanor charge); and count three (same Hobbs Act charge) stems from the same incident as count 14 (same misdemeanor charge).

Anderson, 654 F.2d 1264, 1268-69 (8th Cir.); *cert. denied*, 454 U.S. 1127 (1981). In *Blockburger* v. *United States*, 284 U.S. 299 (1932), the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Id.* at 304. In this case we must decide whether the defendants' acts on three different occasions each constituted a felony under the Hobbs Act and a misdemeanor, or whether only one offense arose from each incident.

In applying the *Blockburger* test to the facts of this case, we note that a violation of the Hobbs Act requires proof of extortion or robbery and an effect upon commerce, but a violation of the Labor Management Relations Act, 29 U.S.C. § 186, does not. A violation of 29 U.S.C. § 186(b)(2) requires that the accused be a labor organization, or a person acting as an officer, agent, representative, or employee of a labor organization; the Hobbs Act, on the other hand, applies to "whoever" violates its provisions. Section 186(b)(2) of the Labor Act requires that the payment be a fee or charge for the unloading, or in connection with the unloading, of the cargo of a motor vehicle employed in the transportation of property in comerce; the Hobbs Act has no such requirement. Therefore, it is plain that a violation of the Hobbs Act can take place that is not at the same time a violation of the Labor Management Relations Act, and vice-versa.

In *Brown* v. *Ohio*, the defendant had been convicted of auto theft and joyriding, and both convictions stemmed from the same incident. In holding that the double jeopardy clause would be violated if the defendant were punished for both offenses, the Supreme Court noted: "The prosecutor who has established joyriding need only prove the requisite intent [permanently to deprive the auto's owner of possession] in order to establish auto theft; the prosecutor who has estabished auto theft

necessarily has estabished joyriding as well." 432 U.S. at 167-68. The same cannot be said in this case. As noted above, the Hobbs Act and the Labor Act each require different elements for a violation to be estabilshed. A prosecutor who establishes a Hobbs Act violation has not necessarily estabished a violation of the Labor Act, and a showing sufficient to support a Labor Act violation does not necessarily prove a violation of the Hobbs Act. We therefore conclude that the felony and misdemeanor charges in this case are not inconsistent, and that the defendants have suffered no double jeopardy or violation of due process.[13]

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[13] *See United States* v. *Kramer,* 355 F.2d 891, 895-96 (7th Cir.), *cert. denied,* 384 U.S. 100 (1966), in which the court held that charges under the Hobbs Act and 29 U.S.C. § 186(b)(1) were not inconsistent.

In *Missouri* v. *Hunter,* 103 S.Ct. 673 (1983), the Supreme Court made it clear that *Blockburger* is a rule of statutory construction, and not a constitutional absolute. The Court held: "[S]imply because two criminal statutes may be construed to proscribe the same conduct under the *Blockburger* test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes." *Id.* at 679.

The Court noted that in *Whalen* v. *United States,* 445 U.S. 684 (1980), it had held that the *Blockburger* test is a rule of statutory construction, and prohibits cumulative punishments under two statutory provisions proscribing the same offense in the absence of a clear indication of contrary legislative intent. 445 U.S. at 691-92.

The court in *Hunter* concluded that when

> [a] legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under *Blockburger,* a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

103 S.Ct. at 679.

Since we find in this case that the two statutes in issue do not proscribe the same offense, we need not reach the issue presented to the Supreme Court in *Hunter, i.e.,* whether the legislature intended to impose cumulative punishments for the same offense.

II. The NLRB's Referral Of The Case To The Department Of Justice.

Before opening statements were given by the attorneys, the prosecutor informed the trial court that an NLRB official would testify that, upon the conclusion of the NLRB's investigation of Local 238's activities at the D&A site, the NLRB requested that the Department of Justice begin criminal investigation into the conduct of some of the union agents in the D&A matter. Defense counsel objected that evidence of the referral was immaterial, and would create an impermissible inference of guilt, since the jury would interpret the referral to mean that the NLRB felt that the defendants were guilty of criminal behavior. The trial court concluded that evidence of the referral was simply background information as to how the government began criminal proceedings in the case, and ruled that the prosecution could present evidence of the referral itself, as long as there would be no evidence as to why the NLRB referred the case to the Department of Justice. Thereafter, in opening statement, the prosecutor told the jury that "the NLRB witnesses will testify that there was a civil action against the union in this case and that the case was then referred to the Department of Justice regarding the union agents as opposed to the union." An NLRB attorney testified that at the conclusion of the NLRB's civil action against Local 238, "[t]he NLRB contacted the Department of Justice and requested that [it] begin investigating Teamster Local 238 for violation of certain criminal statutes."

The defendants argue on appeal that the trial judge erred in admitting evidence of the referral of the case to the Department of Justice, because the evidence created an impermissible inference that the defendants were guilty.

In *Weaver* v. *United States,* 379 F.2d 799, 802-03 (8th Cir.), *cert. denied,* 389 U.S. 962 (1967), the prosecutor told the jury that a "grand jury, . . . selected from the same group of people that you were selected from, sat and heard the Government's

evidence in the case and then determined that there was probable cause to make a charge." *Id.* at 802. The trial court immediately ruled that the statement was improper, and warned the jury that the fact that an indictment has been returned against a defendant "is absolutely no evidence of the guilt of the defendant . . . ." *Id.* This court affirmed the conviction and held that any error caused by the prosecutor's remarks was rendered harmless by the trial court's instructions.[14]

The defendants in this case argue that the same impermissible inference of guilt the prosecutor attempted to create in *Weaver* was in fact created in this case, and the trial court in this case did not instruct the jurors that they were not to infer the defendant's guilt from the fact that the NLRB referred the case to the Department of Justice.

Even if we were to agree that the statement in this case created as strong an impermissible inference of guilt as the statements in the cases discussed above, when we consider the overall evidence of the defendants' guilt we do not find that the trial court committed a clear and prejudicial abuse of discretion in admitting the statements. *See Auto-Owners Insurance Co.* v.

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[14] In *Gordon* v. *United States*, 384 F.2d 598, 600-01 (8th Cir. 1967), a substantial number of the petit jurors in the defendant's case were present while a grand jury was being impaneled and instructed, apparently in an unrelated case. The court instructed the grand jury that it must not return an indictment unless it was convinced the accused was guilty. Gordon, who had been indicted, argued that the instructions to the grand jury, heard by the petit jurors in his case, allowed the petit jurors impermissibly to infer his guilt from the fact that he had been indicted. This court declined to find reversible error, and held that the instructions as a whole to the grand jury were proper, and that the trial court's limiting instructions to the petit jurors, that an indictment may not create an inference of guilt, eliminated any possible prejudice to Gordon's case. *See also Brandom* v. *United States*, 431 F.2d 1391, 1397 (7th Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971); *United States* v. *Lewis*, 423 F.2d 457, 459-60 (8th Cir.), *cert. denied*, 400 U.S. 905 (1970).

Jensen, 667 F.2d 714, 722 (8th Cir. 1981); *United States* v. *Williams,* 545 F.2d 47, 50 (8th Cir. 1976). The referral was mentioned only once by the prosecutor, and was mentioned once briefly by the NLRB attorney who testified. When we compare this to the evidence supporting the defendants' convictions, we find that any "error did not influence the jury, or had but very slight effect," *Kotteakos* v. *United States,* 328 U.S. 750, 764 (1946). We therefore decline to reverse the district court on this ground.

III. **Evidence of Wilford's Character.**

The defendants claim that the trial court erred in admitting character evidence of the defendant Wilford.[13]

The defendants placed the character of Wilford in issue by presenting evidence of his good character; the fundamental question is whether the prosecution exceeded the proper scope of rebuttal. We have examined this issue and find no abuse of discretion by the trial judge.

IV. **Sufficiency of the Evidence of Support Wilford's and Dague's Convictions.**

Wilford argues that the evidence adduced at trial was not sufficient to support his conviction for conspiracy to obtain pro-

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[13] Rule 404 of the Federal Rules of Evidence, which governs the admission of character evidence, states in pertinent part:

> (a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same. . . .

Fed. R. Evid. 404(a)(1).

perty by extortion in violation of the Hobbs Act or his eight convictions for violation of the Labor Management Relations Act.[16] Dague challenges the sufficiency of the evidence to sustain his conviction on count 16, which charged him with aiding and abetting a violation of 29 U.S.C. § 186(b)(2) and (d). Wilford and Dague argue that the trial court erred in denying their motions for acquittal of the above-mentioned counts. We disagree, and find no error by the trial court.

To be guilty of conspiracy, one need knowingly contribute his efforts to the furtherance of the conspiracy. *United States* v. *Fanello*, 662 F.2d 505, 509 (8th Cir. 1981); *United States* v. *Kenny*, 462 F.2d 1205, 1223, 1226 (3d Cir.), *cert. denied*, 409 U.S. 914 (1972). Conviction on a charge of aiding and abetting under 18 U.S.C. § 2 requires that the government show that the defendant willfully associated himself in some way with the criminal venture and willfully participated in it as he would in something he wished to bring about. *United States* v. *Indelicato*, 611 F.2d 376, 385 (1st Cir. 1979); *United States* v. *Crow Dog*, 532 F.2d 1182, 1195 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *United States* v. *Wiebold*, 507 F.2d 932, 934 (8th Cir. 1974). The evidence adduced at trial, when viewed in the light most

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[16] See 18 U.S.C. § 2, which provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Id. Wilford was convicted of count seven, which charged him with requesting, demanding, receiving or accepting money paid by D&A to Local 238, in violation of 29 U.S.C. § 186(b)(1) & (d) and 18 U.S.C. § 2. Wilford was also convicted of counts nine through 14 and count 16, which charged him with aiding and abetting the other defendants' violations of 29 U.S.C. § 186(b)(1) & (2).

favorable to the verdict, showed that Wilford knew of the activities of the other three defendants at the D&A site, that the other three were operating with Wilford's approval, and that the other three were operating with Wilford's approval, and that Wilford endorsed the checks and signed the membership cards of the new "members." Similarly, evidence showed that Dague, as business agent for Local 238, threatened to strike the D&A construction site if non-unin trucks were unloaded there, rejected D&A officials' complaints about the activities of Local 238 on the site, and directed the activities of the defendant Boeding on the site. We find this evidence sufficient to sustain Wilford's and Dague's convictions. The fact that the defendants controverted this evidence does not negate its sufficiency; it only created a conflict in the evidence for the jury to resolve.

V. **Evidence of Prior Similar Acts.**

The defendants argue that the trial court erred in admitting evidence of (1) a charge, filed with the NLRB and subsequently withdrawn, relating to an incident that took place in February 1976 at the Corn Sweeteners plant in southwest Cedar Rapids, and (2) a labor dispute and subsequent NLRB adjudication relating to an incident in September 1975 at the Pittsburgh-Des Moines Steel Company construction site in Cedar Rapids. The prosecution offered the evidence to show the defendants' intent in the D&A incident.[17] The district court instructed the jurors, when the evidence was admitted and at the close of the case, that they were to consider evidence of the other incidents only on the question of the defendants' intent.[18]

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[17] Intent is an essential element of a violation of the Hobbs Act. *See United States* v. *Adcock*, 558 F.2d 397, 402 (8th Cir.), *cert. denied*, 434 U.S. 921 (1977).

[18] Federal Rule of Evidence 404(b) states:

By arguing that they were pursuing legitimate labor objectives (*i.e.*, enforcement of the collective bargaining agreement and the solicitation and organization of new members), the defendants have raised as a material issue their intent in committing these acts. The government sought to introduce evidence of the prior similar acts to show that the defendants were aware that their acts were unlawful, and that their intent was to commit such unlawful acts. Given the similarity of the prior acts to the acts at issue in this case,[19] we find that the evidence of the other acts was relevant to the issue of the defendants' intent.

The defendants argue that the acts relating to the Corn Sweeteners incident were not proven by clear and convincing evidence, since the exhibit to which defendants object regarding this incident was only a charge filed with the NLRB, and was withdrawn before any resolution was reached or any adjudication was made. However, in addition to offering the charge as an exhibit, the government introduced testimony of a vice-president of the general contractor at the Corn Sweeteners plant. The vice-president testified that he was familiar with the circumstances surrounding the charge, that an in-coming truck

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> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

[19] The two prior acts and the acts at issue in this case all involved members of Local 238, including the defendant Dague, who carded the drivers of in-coming trucks and then refused to allow non-union drivers to have their trucks unloaded unless they first joined Local 238. The Corn Sweeteners incident took place in Cedar Rapids in February 1976, the Pittsburgh-Des Moines Steel incident took place in Cedar Rapids in September 1975, and the incidents at issue in this case took place in Cedar Rapids from October 1976 to October 1978.

driven by a non-union driver was stopped and the driver was carded by the defendant Dague, and that the driver was not permitted to unload until two or three days later, when the NLRB began an investigation of the incident. Admission of the charge as an exhibit must be viewed together with the corroborating testimony of the witness to the event; when these two items of evidence are viewed together, it becomes apparent that the incident at the Corn Sweeteners plant was established by clear and convincing evidence. *See United States* v. *O'Brien*, 618 F.2d 1234, 1239 (7th Cir.), *cert. denied*, 449 U.S. 858 (1980) (testimony of participant in both prior incident and incident at issue established existence of prior incident by clear and convincing evidence).[20]

In light of our discussion regarding the similarity of the prior acts to the acts in issue here, we find the other acts to be sufficiently "similar in kind and reasonably close in time to the charge at trial" to be admissible. *See United States* v. *Two Eagle*, 633 F.2d 93, 96 (8th Cir. 1980). We find no error in the trial court's admission of evidence of prior acts.

VI. Local 238's Settlement Agreement with the NLRB.

Before criminal charges were filed by the Department of Justice, the NLRB began an investigation into the activities of Local 238 at the D&A construction site. The investigation ended when the NLRB and Local 238 entered into a formal settlement stipulation, whereby Local 238 agreed to cease its disputed ac-

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[20] *Cf. United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979):

> The standard for the admissibility of extrinsic offense evidence is that of [Fed. R. Evid.] 104(b): "the preliminary fact can be decided by the judge against the proponent only where the jury could not reasonably find the preliminary fact to exist."

582 F.2d at 913.

tivities at the D&A site, and refund the fees paid by certain non-union drivers. Local 238 expressly noted in the stipulation that it was not admitting that it had violated the National Labor Relations Act.

At trial the government offered into evidence two exhibits containing the settlement agreement, and the testimony of an NLRB attorney concerning the circumstances surrounding the agreement. The trial court admitted the evidence over the defendants' objections.

The defendants argue on appeal that evidence of the settlement stipulation was irrelevant and immaterial, since the defendants were not parties to the agreement, and therefore should not have been admitted. Defendants also contend that evidence of the settlement stipulation was inadmissible under Fed. R. Evid. 408.[21] The government counters that the defendants, on cross-examination of drivers who had received the refunds, placed in issue the circumstances surrounding the refunds, and therefore the government was entitled to introduce evidence of

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[21] That rule provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another prupose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

the settlement stipulation to explain fully the circumstances in which Local 238 made the refunds.[22]

To determine whether the trial court properly admitted evidence of the settlement stipulation, we must decide first, whether the evidence was relevant to an issue in the lawsuit, and second, whether rule 408 prohibited admission of the evidence.

During the trial, on direct examination, the government asked driver J.W. Coon whether the money he used to pay Local 238's fee came from his own pocket or whether he was reimbursed for it. Coon responded that he was not "reimbursed" until some time later, when Local 238 mailed him a check refunding the fee he had paid at the D&A site.

The prosecutor asked another driver, Charles Boyd, whether he had received anything from Local 238 after he had paid the fee and had left the D&A site. Boyd responded that he was uncertain whether he had received a newsletter or anything similar, but Local 238 had sent him a refund of the fees he had paid. The prosecutor followed this response with a question as to whether Boyd had ever received anything else from Local 238, and whether he wanted to be a member of Local 238. On cross-examination, defense counsel asked Boyd whether he had sent the refund to the trucking company that had paid the fee. Boyd responded that when he received the refund he was no longer associated with the trucking company that paid the fee, so he kept the refund.

On the direct examination of Charles Higgs, another driver, the prosecutor asked him if he knew why he received a refund from the union, and if he knew why he received a refund from the union, and if he knew from whom he had received the re-

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[22] The government also argues on appeal that the defendants did not object on the ground that admission of the evidence would violate rule 408, and therefore the issue is not preserved for appeal. *See* Fed. R. Evid. 103(a)(1). Because we find that the evidence was admissible even assuming the defendants properly objected, we need not reach this issue.

fund. Higgs answered "no" to both questions. On cross-examination, defense counsel showed Higgs a copy of the refund check, whereupon Higgs stated that he received the refund from the defendant Wilford, and from Local 238.

Subsequent to this testimony, the prosecutor sought to introduce evidence of the settlement stipulation "to explain the situation involving those [refunds], why the [refunds] were made, who they went to, the amount, and generally [to] explain to the jury under what circumstances [these refunds were] made to these truck drivers. . . ."

Because the defense counsel placed the refunds in issue, the government was entitled to explain to the jury the circumstances surrounding the refunds. The prosecutor's questions on direct examination to drivers Coon and Boyd were not intended to examine whether and why the drivers had received refunds; the prosecutor inquired of Coon whether he had been *reimbursed* for the fee he had paid, and inquired of Boyd whether he had received any materials or benefits from Local 238, and whether he wanted to be a member of Local 238. When defense counsel on cross-examination inquired of the drivers whether they had kept the refunds themselves, and elicited a response from Higgs that the refund had come from Local 238 and the defendant Wilford, he placed in issue the matter of under what circumstances the refunds were made. As a result, the government was entitled to show that the refunds in fact stemmed from an agreement by Local 238 with the NLRB. Thus, we conclude the evidence of the settlement stipulation was relevant to an issue in the lawsuit.

We also find that rule 408 does not bar admission of the evidence. That rule provides that evidence of compromise or offers to compromise "is not admissible to prove liability for or invalidity of the claim or its amount." The rule expressly states that it "does not require exclusion when the evidence is offered for another purpose. . . ." Fed. R. Evid. 408. In this case evidence of the settlement stipulation was offered to explain the

circumstances surrounding the refunds, not to show that Local 238 violated the National Labor Relations Act. The defendants were further protected from any inference of guilt by the provision in the stipulation which stated that Local 238 did not admit to any violation by entering into the stipulation.

We therefore conclude that the trial court properly admitted evidence of the settlement stipulation.

VII. **Denial of the Defendants' Request for Surrebuttal.**

The defendants argue that a witness presented by the government during its rebuttal brought forward new facts not raised earlier, and that the defendants were entitled to present evidence on surrebuttal to counter the witness' testimony and to impeach his credibility. The trial court sustained the government's objection to surrebuttal by the defendants.

The witness, an investigator for the NLRB, testified as to his observation of events taking place at the Pittsburgh-Des Moines Steel Co. site (discussed in section V *supra*). The government's stated purpose in offering the investigator's testimony was to show the similarity of the Pittsburgh-Des Moines incident to the incident for which the defendants were being tried. The defendants argue that they were entitled to present evidence in surrebuttal because the witness intimated that a violent act took place in connection with the stopping of a truck driven by a non-union driver,[23] and because the defendants were entitled to show the investigator's bias against the Teamsters Union.

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[23] The investigator testified that he was standing next to two members of the iron workers union when a non-union driver approached the site in his truck. According to the investigator, one iron worker said to the other, "Do you want to take him or should I?" The other replied, "Let me have him," crushed his paper cup and threw it on the ground, and started walking toward the truck to card the driver. The investigator testified that he feared that some form of violence might erupt between the driver and the iron workers, so he walked over to talk to the iron worker who was carding the truck. No violence of any sort did occur.

The decision whether to allow a party to present evidence in surrebuttal is committed to the sound discretion of the trial court. *United States* v. *Burgess*, 691 F.2d 1146, 1153 (4th Cir. 1982); *Kines* v. *Butterworth*, 669 F.2d 6, 13 (1st Cir. 1981), *cert. denied*, 456 U.S. 980 (1982); *United States* v. *Greene*, 497 F.2d 1068, 1083 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). In this case we find no abuse of discretion by the trial judge in his refusal to allow the defendants' surrebuttal. The defendants' argument that the investigator's testimony "raised the most serious suggestion of force or violence in connection with any labor dispute during the trial" exaggerates the impact of the investigator's testimony. In addition, even though a party is normally entitled to impeach the credibility of an opponent's key witness, *see Kines* v. *Butterworth*, 669 F.2d at 13, in this case the investigator was not a key government witness, and in light of other evidence adduced at trial, his testimony regarding the similarity of the Pittsburgh-Des Moines incident to the incident for which the defendants were being tried was merely cummulative. Thus, it was not unfairly prejudicial for the trial court to refuse to allow the defendants to present evidence in surrebuttal. As the Seventh Circuit noted in *United States* v. *Greene*:

> When the point of completion of a trial has been reached, which was the situation here, the trial judge should be vested with substantial discretionary powers to bring the evidentiary phase to a close, or to put it another way, to curb the natural tendency of vigorous counsel to get in the final word.

497 F.2d at 1083. We find no prejudicial error in the trial court's ruling.

Conclusion.

Because we find no prejudicial error in the contested rulings of the trial judge, the defendants' convictions are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF IOWA

DOCKET NO. CR 81-10

DEFENDANT: HARRY J. WILFORD

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: February 1, 1982

WITH COUNSEL: Raymond Rosenberg

FINDING & JUDGMENT

There being a verdict of GUILTY

Defendant has been convicted as charged of the offense(s) of a violation of 18 U.S.C. § 1951 as charged in Count 1 of the Superseding Indictment; violations of 29 U.S.C. § 186(b)(1) and (d) and 18 U.S.C. § 2 as charged in Counts 7, 9 and 10 of the Superseding Indictment; and violations of 29 U.S.C. § 186(b)(2) and (d) and 18 U.S.C. §2 as charged in Counts 11, 12, 13, 14 and 16 of the Superseding Indictment.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

It is adjudged that as to Count 1, defendant pay a fine to the United States in the sum of $10,000 and the imposition of

sentence as to imprisonment only is suspended and defendant is placed on probation for a period of three years on the usual terms and conditions as to Counts 7, 9, 10, 11, 12, 13, 14 and 16, the defendant pay a fine to the United States in the sum of $3000 for each count.

The defendant shall stand committed until the fine is paid or he is otherwise discharged by due course of law.

In the event of appeal, an appeal bond in the amount of the fine assessed may be filed, but by no later than 12:00 Noon, February 4, 1982.

The court advised defendant of his right to appeal, to appeal in forma pauperis, and to the assistance of the Clerk.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends.

Approved by: /s/ Asst. United States Atty.

Signed By: U.S. District Judge
/s/ Edward J. McManus

Date: February 1, 1982

APPENDIX C

UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF IOWA

DOCKET NO. CR 81-10

DEFENDANT: EVERETT G. DAGUE

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: February 1, 1982

WITH COUNSEL: Raymond Rosenberg

FINDING & JUDGMENT

There being a verdict of GUILTY

Defendant has been convicted as charged of the offense(s) of violations of 18 U.S.C. § 1951 as charged in Counts 1, 2, 4, 5 and 6 of the Superseding Indictment: a violation of 29 U.S.C. § 186(b)(1) (d) and 18 U.S.C. §2 as charged in Count 9 of the Superseding Indictment; and violations of 29 U.S.C. § 186(b)(2) and (d) and 18 U.S.C. §2 as charged in Counts 11, 13 and 16 of the Superseding Indictment.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

It is adjudged that as to Counts 1, 2, 4, 5 and 6, defendant pay a fine to the United States in the sum of $2000 for each count and

the imposition of sentence as to imprisonment only is suspended and defendant is placed on probation for a period of three years on the usual terms and conditions: as to Counts 9, 11, 13 and 16, the defendant pay a fine to the United States in the sum of $2000 for each count.

The defendant shall stand committed until the fine is paid or he is otherwise discharged by due course of law.

In the event of appeal, an appeal bond in the amount of the fine assessed may be filed, but by no later than 12:00 noon, February 4, 1982.

The court advised defendant of his right to appeal, to appeal in forma pauperis, and to the assistance of the Clerk.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

Approved by: /s/ Asst. United States Atty.

Signed By: U.S. District Judge
/s/ Edward J. McManus

Date: February 1, 1982

APPENDIX D

UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF IOWA

DOCKET NO. CR 81-10

DEFENDANT: HERMAN J. CASTEN

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: February 1, 1982

WITH COUNSEL: Tom Riley

FINDING & JUDGMENT

There being a verdict of GUILTY

Defendant has been convicted as charged of the offense(s) of violations of 18 U.S.C. § 1951 as charged in Count 1 and 3 of the Superseding Indictment; violations of 29 U.S.C. § 186(b)(1) and (d) and 18 U.S.C. § 2 as charged in Count 7 of the Superseding Indictment; and violations of 29 U.S.C. § 186(b)(2) and (d) and 18 U.S.C. §2 as charged in Counts 12 and 14 of the Superseding Indictment.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

It is adjudged that as to Counts 1 and 3, defendant pay a fine to the United States in the sum of $2000 for each count and the im-

position of sentence as to imprisonment only is suspended and defendant is placed on probation for a period of three years on the usual terms and conditions; as to Counts 7, 12, and 14, the defendant pay a fine to the United States in the sum of $1000 for each count.

The defendant shall stand committed until the fine is paid or he is otherwise discharged by due course of law.

In the event of appeal, an appeal bond in the amount of the fine assessed may be filed, but by no later than 12:00 Noon, February 4, 1982.

The court advised defendant of his right to appeal, to appeal in forma pauperis, and to the assistance of the Clerk.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

Approved by: /s/ Asst. United States Atty.

Signed By: U.S. District Judge
/s/ Edward J. McManus

Date: February 1, 1982

APPENDIX E

UNITED STATES DISTRICT COURT FOR
NORTHERN DISTRICT OF IOWA

DOCKET NO. CR 81-10

DEFENDANT: HERMAN B. BOEDING

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: February 1, 1982

WITH COUNSEL: Robert F. Wilson

FINDING & JUDGMENT

There being a verdict of GUILTY

Defendant has been convicted as charged of the offense(s) of violations of 18 U.S.C. § 1951 as charged in Counts 1, 2, 3, 4, 5 and 6 of the Superseding Indictment; violations of 29 U.S.C. § 186(b)(1) and (d) and 18 U.S.C. §2 as charged in Counts 7, 9 and 10 of the Superseding Indictment; and violations of 29 U.S.C. § 186(b)(2) and (d) and 18 U.S.C. §2 as charged in Counts 11, 12, 13, 14 and 16 of the Superseding Indictment.

Sentence or Probation Order

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that:

It is adjudged that as to Counts 1, 2, 3, 4, 5 and 6, defendant pay a fine to the United States in the sum of $1000 for each

count and the imposition of sentence as to imprisonment only is suspended and defendant is placed on probation for a period of three years on the usual terms and conditions; as to Counts 7, 9, 10, 11, 12, 13, 14 and 16, the defendant pay a fine to the United States in the sum of $500 for each count.

The defendant shall stand committed until the fine is paid or he is otherwise discharged by due course of law.

In the event of appeal, an appeal bond in the amount of the fine assessed may be filed, but by no later than 12:00 Noon, February 4, 1982.

The court advised defendant of his right to appeal, to appeal in forma pauperis, and to the assistance of the Clerk.

Additional Conditions of Probation

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue warrant and revoke probation for a violation occurring during the probation period.

Commitment Recommendation

The court orders commitment to the custody of the Attorney General and recommends,

Approved by: /s/ Asst. United States Atty.

Signed By: U.S. District Judge
/s/ Edward J. McManus

Date: February 1, 1982

APPENDIX F

Order Of United States Court Of Appeals For The Eighth Circuit Denying Petition For Rehearing En Banc And Dissenting Opinions

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 821185/1186/1187/1188

September Term 1982

United States of America,
Appellee,

v.

Wilford, Dague, Casten, and Boeding,
Appellants.

Appeal from the United States District Court
for the Northern District of Iowa

The Court, having considered appellant's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Heaney, Bright and McMillian would grant the petition for rehearing en banc.

August 1, 1983

APPENDIX G

Statutory Provisions

18 U.S.C. Section 1951 provides as follows:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violance to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the Untied States; all commerce between any point in the State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same state through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52,101-115,151-166 of Title 29 or sections 151-188 of Title 45.

29 U.S.C. Section 186(b)(1) provides as follows:

Request, demand, etc., for money or other thing of value

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

29 U.S.C. Section 186(b)(2) provides as follows:

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

29 U.S.C. Section 186(d) provides as follows:

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

18 U.S.C. Section 2 provides as follows:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

No. 83-496

In the Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. WILFORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

ROBERT J. ERICKSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the Hobbs Act, 18 U.S.C. 1951, reaches the conduct of union officials who, employing threats of economic harm, exact monetary payments from non-union truck drivers under the guise of collecting "dues and initiation fees" to which the union has no lawful claim.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-496

HARRY J. WILFORD, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A26) is reported at 710 F.2d 439.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1983. A petition for rehearing was denied on August 1, 1983 (Pet. App. A35). The petition for a writ of certiorari was filed on September 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Iowa, petitioners, all officers or members of Teamsters Local 238 in Cedar Rapids, Iowa, were convicted of conspiracy to obstruct commerce by extorting money under threats of economic harm, in violation of the Hobbs Act, 18 U.S.C. 1951. In addition, petitioner Wilford was convicted on three counts of unlawfully

receiving funds on behalf of the union, in violation of 29 U.S.C. 186(b)(1), and five counts of unlawfully demanding an unloading fee, in violation of 29 U.S.C. 186(b)(2); petitioner Dague was convicted on four substantive counts of extortion, one count of unlawfully receiving funds on behalf of the union, and three counts of unlawfully demanding an unloading fee; petitioner Casten was convicted on one substantive count of extortion, one count of unlawfully receiving funds on behalf of the union, and two counts of unlawfully demanding an unloading fee; and petitioner Boeding was convicted on five substantive counts of extortion, three counts of unlawfully receiving funds on behalf of the union, and five counts of unlawfully demanding an unloading fee. Petitioners were each sentenced to three years' probation and fined as follows: Wilford, $34,000; Dague, $18,000; Casten, $7,000; and Boeding, $10,000.

The facts are not in dispute. In 1976, the construction firm of Darin and Armstrong, Inc. (D & A) began work as general contractor on a waste treatment plant in Cedar Rapids, Iowa. Building materials were routinely delivered to the construction site by self-employed truck drivers or by non-union drivers affiliated with trucking companies that were neither parties to nor subject to the collective bargaining contract in force between D & A and Local 238. Tr. 419-420, 671-672, 827-828, 844-845, 861, 869-871.[1] Nevertheless, petitioners exacted $49 in union "initiation fees and

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[1]The pertinent contract provisions are set out at Pet App. A4 n.2. Under those terms, D & A agreed to employ union members "on work coming within the scope of structural building work or operations" (*ibid.*). However, neither this provision nor the provision awarding the Teamsters jurisdiction to operate trucks on the job site (*ibid.*) applied to over-the-road drivers who performed "delivery work" rather than actual "construction work" on the site (Tr. 419-420, 856-861, 868-870, 885, 1451). For purposes of the contract, building materials were not considered to be "on site" — and hence within the jurisdiction of Local 238 under the contract — until the materials were actually unloaded from the delivery vehicles (Tr. 827, 861, 869).

membership dues" from each non-union driver as a prerequisite to completing delivery and having his truck unloaded at the construction site. The payments were exacted by actual and threatened refusals to allow non-union truckers to make deliveries if they declined to pay the $49 fee. Pet. App. A3-A4.

Acting as the Teamster steward at the construction site (Tr. 470-471, 657-679), petitioner Boeding stopped all incoming trucks, "carded" the drivers for their union affiliations, and informed non-union drivers that they could not unload their trucks unless they first "joined" Local 238 by paying the $49 fee (Pet. App. A3-A4). Petitioners Dague and Casten, both business agents of Local 238, prepared the necessary papers and collected the payments from the non-union drivers (*id.* at A4). For his part, as secretary-treasurer and chief executive officer of Local 238, petitioner Wilford oversaw the union's activities, deposited the funds collected from the non-union drivers, and signed the membership cards issued to them (*ibid.*).

Despite repeated protests from individual drivers and D & A officials, petitioners' practice continued unabated throughout 1977 and into the spring of 1978. Although not interested in joining Local 238, most non-union drivers eventually paid the $49 fee demanded of them (Pet. App. A4).[2] However, those who paid the fee did so only to ensure that their trucks would be unloaded (*ibid.*) and to minimize

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[2]On occasion, when drivers were unwilling or unable to pay the demanded membership fee, D & A would provide the payment money for them in order to avoid project delays (Pet. App. A5). In addition, as the court below noted (*ibid.*), "[a]t least one driver refused to pay the fee, and left the site without having been unloaded."

their financial losses (see, *e.g.*, Tr. 117, 224, 268-270, 274, 288, 316, 481, 498, 501, 505, 528-532, 537, 550, 598, 695).[3]

The over-the-road drivers, most of whom had considerable experience, had never encountered a similar demand in their deliveries to other construction sites (see, *e.g.*, Tr. 229, 316, 363-364, 407, 484, 535, 559-560, 579, 601, 617, 714-715, 753; cf. Tr. 871-872). Accordingly, various drivers characterized the payments as unloading fees rather than bona fide union dues. Driver J.W. Coon, for example, labelled the practice banditry (Tr. 317); driver Donald Zieber called it a "shaky * * * * * way to get in [his] pocket" (Tr. 363, 378); driver Charles Boyd stated that "it was just taking another truck driver * * * [i]t was just $49 to pay to get unloaded" (Tr. 498); driver Charles Unsel considered it "[a] rip off * * * just to get my load unloaded" (Tr. 557); and driver John Kimbel testified that "it was just to get unloaded. Like a bribe" (Tr. 576). Indeed, consistent with petitioner Boeding's statements to driver Gary Pierce that his membership benefits from Local 238 were limited solely to the right to unload at the site for as long as he paid his dues (Tr. 92, 101, 106-107), none of the over-the-road drivers who joined Local 238 ever received collective bargaining representation

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[3]The drivers testified that they would suffer financial losses if their trucks were not unloaded (Tr. 105, 126-127, 146-147, 241-242, 260, 277-278, 371, 406, 639, 697, 713, 749-750, 753), and that they did not believe that their trucks would be unloaded if they refused petitioners' demands (Tr. 224, 533, 552, 638-689). Petitioner Boeding admitted at trial that self-employed truck drivers would suffer losses if their vehicles were not unloaded (Tr. 1094). Furthermore, the drivers, who encountered delays at the site ranging from several hours to several days as a result of petitioners' demands (see, *e.g.*, Tr. 112, 262-263, 404, 407, 428-429, 493-494, 500, 523, 641-642, 666, 750), suffered actual financial harm since they were prevented from picking up other loads (Tr. 146-147, 407, 483, 713).

or any other benefits from Local 238 (see, *e.g.*, Tr. 226-227, 238, 372-373, 483-484, 501-502, 534, 557-558, 580, 697-698).[4]

In pressing their demands, petitioners were insistent that all non-union drivers arriving at the site join not just any Teamsters local but Local 238 in particular. Thus, when a driver arrived at the site who owed dues to another Teamsters local (Tr. 216-221, 225-226) or who was on withdrawal status from another local (Tr. 284, 286-287, 289, 291), the driver was compelled to join Local 238 rather than merely updating his membership in the Teamsters local where he was employed. Petitioners also rejected the suggestion that members of Local 238 drive the over-the-road vehicles onto the construction site rather than requiring the non-union drivers to join Local 238 (Tr. 362-363, 382, 785, 787).[5] Finally, petitioners would not permit over-the-road drivers who were union members to switch trucks with their non-union colleagues for purposes of unloading. For example, when driver Calvin Swanson prevailed upon a fellow employee who belonged to Local 238 to drive his truck onto the site, petitioner Boeding told them that "in order to unload * * *, the load should have originated with a union man and so therefore, they wouldn't honor it even though it [the substitute driver] was a union man in Cedar Rapids" (Tr. 135-136). Similarly, after driver Orville Taylor's fee was paid on March 14, 1978, Taylor saw several trucks lined up

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[4]Petitioner Wilford admitted at trial that he never undertook to negotiate or make bargaining demands on behalf of the over-the-road drivers who paid membership fees at the D & A site (Tr. 1378-1379). Moreover, the over-the-road drivers resided and worked beyond Local 238's geographic jurisdiction (Tr. 1367).

[5]At trial, petitioner Boeding admitted that he refused to allow substitute drivers to take trucks onto the site for unloading (Tr. 1092-1093). However, Local 238's attorney testified that petitioners never informed him of this action and stated that it was contrary to the union's goal "to get our people to drive every truck we can get on" (Tr. 1183).

at the gate, unable to unload unless the drivers joined the union (Tr. 640-641). Taylor told petitioner Boeding, "I am a Teamster now. I can drive the trucks in for them" (Tr. 641). Boeding replied, "No, you can't drive them in. That [the $49 payment] was for your truck" (*ibid.*). In the same vein, on April 10, 1978, driver Douglas Watson inquired whether a co-worker who had already paid his fee to Local 238 could take several waiting trucks onto the site (Tr. 747-748, 767). Petitioner Boeding replied, "[N]o way in hell," and said that a $49 fee was required to unload each truck no matter who drove the truck onto the site (*ibid.*).

Petitioners' practice of stopping non-union drivers continued until mid-April 1978, when an NLRB investigator arrived at the construction site in response to a complaint filed by a driver (Pet. App. A5). During the investigation, the NLRB investigator interviewed petitioners Boeding (Tr. 908-912), Casten (Tr. 912-914), and Dague (Tr. 915-917), each of whom denied that there was any requirement that over-the-road drivers join Local 238 in order to have their trucks unloaded (Tr. 909, 914, 917). In addition, all three men denied telling D & A officials or individual drivers that the drivers had to join Local 238 before being unloaded (Tr. 909, 914, 916, 917). Despite these denials, the NLRB commenced an injunctive action as a result of its investigation (Pet. App. A5). Local 238 thereafter entered into a settlement stipulation under which it agreed to terminate the challenged practice and to refund membership fees to several over-the-road drivers (*ibid.*).

ARGUMENT

Petitioners do not dispute that they induced over-the-road drivers to part with money or that their activities affected interstate commerce. Rather, relying on *United States* v. *Enmons*, 410 U.S. 396 (1973), petitioners contend (Pet. 6-13) that their conduct did not constitute "extortion"

within the meaning of the Hobbs Act, 18 U.S.C. 1951, because its purpose was not "wrongful." As the court of appeals correctly observed (Pet. App. A9), however, there was sufficient evidence to show that petitioners "had no lawful claim to the money they received from the non-union drivers" and that they were not pursuing "legitimate labor objectives." Accordingly, petitioners' extortion convictions do not conflict with this Court's holding in *Enmons*.

1. As the Court noted in *Enmons*, Congress enacted the Hobbs Act " 'to prevent both union members and non-union people from making use of robbery and extortion under the guise of obtaining wages in the obstruction of interstate commerce.' " 410 U.S. at 403, quoting 91 Cong. Rec. 11900 (1945) (remarks of Rep. Hancock). In particular, the Hobbs Act was intended to overrule this Court's construction of its predecessor statute, the Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979. In *United States* v. *Local 807*, 315 U.S. 521 (1942), union members stopped all out-of-town truckers entering New York City and exacted a fee (based on the union wage scale) from each trucker before the drivers were allowed to deliver their cargoes (*id.* at 526, 539). Relying upon a wage exemption contained in the Anti-Racketeering Act, the Court held that the union members could not be prosecuted for extortion. Against this background, Congress passed the Hobbs Act, which broadly proscribes "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear * * *" (18 U.S.C. 1951(b)(2)). See generally *Enmons*, 410 U.S. at 401-404.

In interpreting the Hobbs Act, this Court has upheld its application to union officials who compelled an employer to pay "wages" to union members for "imposed, unwanted, superfluous and fictitious services * * *." *United States* v. *Green*, 350 U.S. 415, 417 (1956). Rejecting the claim that the

indictment in *Green* merely described traditional union efforts to secure "made work" for its members (*id.* at 418), the Court concluded that the Hobbs Act "was meant to eliminate any grounds for future judicial conclusions that Congress did not intend to cover the employer-employee relationship" (*id.* at 419) (footnote omitted). The Court also rejected petitioners' present argument (Pet. 7-8) that the Hobbs Act was intended to cover only conduct that resulted in personal gain for the extortionist; the Court stated unequivocally that "extortion as defined in the statute in no way depends upon having a direct benefit conferred on the person who obtains the property" (*id.* at 420).[6]

Similarly, in *Enmons*, 410 U.S. at 401-404, 408, the Court reiterated that the Hobbs Act reaches the type of union activities involved in *Local 807* and *Green*; however, it refused to extend the statute to the activities of union members charged with acts of violence during a strike. The Court concluded that the term "wrongful" in the Hobbs Act's definition of extortion "limits the statute's coverage to those instances where the obtaining of the property would itself be 'wrongful' because the alleged extortionist has no lawful claim to the property" (410 U.S. at 400). Relying heavily on the Act's legislative history, the Court concluded that the statute "does not apply to the use of force to achieve legitimate labor ends" (*id.* at 401), such as higher wages or employment benefits. In so holding, however, the Court made clear that its decision did not preclude extortion prosecutions in situations involving unlawful labor objectives, including those situations in which the accused has no lawful claim to the payment (*id.* at 400).

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[6]In their brief as amicus curiae (at 5), the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America advance the same erroneous argument. Like petitioners, the Teamsters fail to acknowledge that their contention was rejected in *Green*.

In keeping with the decisions of this Court, the courts of appeals have consistently held that the *Enmons* exception applies only to that class of cases in which threats or force have been utilized by unions in the bona fide pursuit of legitimate objectives, such as higher wages sought through collective bargaining with an employer. For example, in *United States* v. *Quinn*, 514 F.2d 1250 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976), the court held that where a union representative demanded and received payments from an employer in violation of the Taft-Hartley Act, 29 U.S.C. 186(b)(1), the demand could not be regarded as having been made in pursuit of a legitimate labor goal. Thus, even though there was a bona fide labor dispute and Quinn was representing employees in their quest for higher pay, the court stated (514 F.2d at 1259):

> The decisive point is that federal labor law * * * specifically declared that Quinn, in the exercise of duress, had no lawful claim to the payment; its receipt was statutorily declared not to be a legitimate labor objective. Thus, it was wrongful and the Enmons rationale provides no defense.

Similarly, in *United States* v. *Clemente*, 640 F.2d 1069 (2d Cir.), cert. denied, 454 U.S. 820 (1981), the court concluded that inducing or exploiting fear of economic loss, the extortionate means charged, was not an inherently wrongful labor tactic, but that "when employed to achieve a wrongful purpose, its 'use' is wrongful" (*id.* at 1077). The defendants in *Clemente*, who used their power to call waterfront work stoppages to coerce the payment of money by businesses, were found to have used wrongful means in violation of the Hobbs Act because their objective — to obtain money to which they were not lawfully entitled — was wrongful, and therefore unlike the "legitimate" wage demands in *Enmons*. See also *United States* v. *Russo*, 708 F.2d 209, 215 (6th Cir.

1983), cert. denied, No. 83-368 (Nov. 28, 1983); *id.* at 216 (Martin, J., concurring); *United States* v. *Porcaro*, 648 F.2d 753, 760 (1st Cir. 1981); *United States* v. *Thordarson*, 646 F.2d 1323, 1327-1329 (9th Cir.), cert. denied, 454 U.S. 1055 (1981); *United States* v. *French*, 628 F.2d 1069, 1075 (8th Cir.), cert. denied, 449 U.S. 956 (1980); *United States* v. *Cerilli*, 603 F.2d 415, 419-420 (3d Cir. 1979), cert. denied, 444 U.S. 1043 (1980); *United States* v. *Warledo*, 557 F.2d 721 (10th Cir. 1977).

2. Applying this consistent body of case law, it is evident that the court below correctly concluded that petitioners' demands were unlawful because they were not made in the pursuit of a legitimate labor objective, as defined in *Enmons*. Petitioners' suggestion (Pet. 6) that they were merely engaged in legitimate organizational efforts is belied by the fact that none of the out-of-state drivers ever received the benefits of union representation, and "at least one new 'member' was told that he would receive no union benefits in return for his payment except the opportunity to have his truck unloaded in the Cedar Rapids area" (Pet. App. A9). Moreover, most of the victims testified that they were self-employed owner-operators and not employees of a trucking company. Not only would union membership be of no conceivable use to such persons, but the National Labor Relations Act establishes that requiring self-employed persons to join any labor organization is per se an illegitimate labor objective. See 29 U.S.C. 158(b)(4)(A). And, even with respect to the non-union employees of trucking companies, it was contrary to both the National Labor Relations Act (29 U.S.C. 157) and the Iowa "right-to-work" law (Iowa Code Ann. § 731.1 *et seq.* (West 1979)) to compel union membership. Finally, petitioners' course of conduct constituted a violation both of the Taft-Hartley Act's prohibition against the acceptance of payments from an employer (29

U.S.C. 186(b)(1)) and its prohibition against exacting an unloading fee (29 U.S.C. 186(b)(2)).[7]

Despite the substantial evidence that petitioners obtained money to which neither petitioners nor their union had a lawful claim, petitioners nonetheless contend (Pet. 10) that *Enmons*' concern for "legitimate" labor demands encompasses all labor activities that are "traditional" and not just those that are in fact "lawful." But the unions in *Local 807* and *Green* were pursuing the "traditional" goal of attempting to obtain as much work as possible for their members. Nevertheless, as *Enmons* itself makes clear (410 U.S. at 408), those unions had no lawful claim to the "wages" paid in those cases.

Rather than *Enmons*, the case at bar is like *Local 807* and *Green*. The only difference is that the drivers here paid fees that petitioners called "initiation fees and dues" and the money went to the union treasury rather than to individual union members. But these are distinctions without a difference. See *Green*, 350 U.S. at 420. As the court below noted (Pet. App. A10), it was petitioners' objective

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[7]Nor can petitioners convincingly contend that their demand for membership was lawful under the jurisdictional provisions of Local 238's contract with D & A and therefore required to maintain the integrity of the job site. The transient drivers were not employees of D & A subject to the agreement, nor did they perform any construction work on the site; accordingly, as a matter of law, the terms covering work jurisdiction in the D & A contract with Local 238 could not apply to the independent truckers making deliveries to Cedar Rapids. See *Joint Council of Teamsters* v. *NLRB*, 671 F.2d 305 (9th Cir. 1981); *Drivers Local No. 695* v. *NLRB*, 361 F.2d 547 (D.C. Cir. 1966). Moreover, as the court below stated (Pet. App. A10), petitioners' claimed reliance on the contract "is belied by the fact that non-union drivers were not allowed by the defendant Boeding to trade their loads with a union driver, and by the fact that the new 'members' were not allowed to drive trucks of other non-union drivers onto the site."

> to force non-union drivers to pay an unloading fee, and to force *all* non-union drivers, even self-employed drivers, to join, not just any Teamsters Union local, but Local 238 in Cedar Rapids, Iowa, regardless of whether the drivers' home or usual route of travel included Cedar Rapids.

Since there was no indication that the victim drivers were likely to return to the Cedar Rapids area or that they had any need for representation by Local 238 (which they did not receive in any event), petitioners' demands for "membership fees" were as unwanted and fictitious as the "wage" demands in *Local 807*. Thus, regardless of whether the instant practices may properly be characterized as "traditional," they were not "legitimate" within the meaning of *Enmons*.[8]

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[8]The legislative history upon which petitioners rely (Pet. 8-12) is the same material the Court looked to in *Enmons* for its conclusion that the Hobbs Act does not apply to *legitimate* labor activity. As we have shown, Congress's concern for legitimate union activities has no application to the present case, in which membership fees were extorted from independent transient truckers, who neither wanted to join nor could legally be compelled to join Local 238. There is thus no merit to the Teamsters' argument (Br. 6-8) that the decision below will have a chilling effect on labor's "legitimate" organizational activities.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HARRY J. WILFORD, EVERETT G. DAGUE, HERMAN J. CASTEN and HERMAN B. BOEDING,
Petitioners

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UNITED STATES OF AMERICA,
Respondent

On Appeal from the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA AS AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

This brief amicus, in support of the position of Petitioners Harry J. Wilford, Everett G. Dague, Herman J. Casten and Herman B. Boeding, is filed with the consent of the parties, as provided for in Rule 36 of the Rules of this Court, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a labor organization with approximately seven hundred fifteen (715) affiliated local unions having a mem-

bership of approximately 1.8 million working men and women. It is the largest and most diverse labor organization in the United States. Its affiliated local unions represent American workers in every phase of the economy for purposes of collective bargaining with their employers. Accordingly, the International Union has a vital interest in the laws delineating the framework of the labor relations system and those which impact upon the rights of unions and their members within that system.

The decision of the United States Court of Appeals for the Eigth Circuit in *United States* v. *Wilford*, 710 F.2d 439 (8th Cir.), *petition for cert. filed*, 52 U.S.L.W. 3268 (U.S. Sept. 23, 1983) (No. 83-496), concludes that certain acts intended to further the legitimate goals of a union involved in a labor dispute violate the Hobbs Act, 18 U.S.C. § 1951. Previously, this Court narrowly limited the application of the Hobbs Act based upon the expressed Congressional intent that it be utilized to control pursuit of illegal goals. The Eighth Circuit's imposition of the Hobbs Act upon concerted activities in labor-management relations, in conjunction with the severe penalties which are designed without regard to the effect they have on the exercise of other legitimate rights, is inconsistent with the carefully constructed federal labor system and is well beyond the intended purpose of the Act.

The International Union and its affiliated local unions and members, active participants in the existing system of labor-management relations, have an interest in preserving that process which merits the consideration of its views by this Court. In supporting the petition for certiorari, the amicus does not assert that illegal conduct committed during a labor dispute be immune from criminal prosecution merely because it is intended to achieve a legitimate objective, but contends that random acts of misconduct should continue to be the responsibility of state law enforcement authorities, the National Labor

Relations Board and the federal government pursuant to federal laws other than the Hobbs Act.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Eighth Circuit is in direct conflict with this Court's decision in *United States* v. *Enmons*, 410 U.S. 396 (1973). In *Enmons*, this Court held that the Hobbs Act prohibition of the "wrongful" use of force or violence to obtain property limited the statute's coverage to instances where the defendant had no lawful claim to property. In applying this holding to labor-management relations, this Court established that the Hobbs Act does not reach the "use of violence to achieve legitimate union objectives." 410 U.S. at 400.

The decision is inconsistent with those of other Circuit Courts of Appeals which have properly limited application of the Hobbs Act to situations where the defendants did not have a legitimate claim to the property and, therefore their activities were in pursuit of illegitimate labor objectives. In *Wilford*, the Eighth Circuit's failure to engage in the essential analysis of the Hobbs Act, as established by *Enmons*, subjects union officials to federal extortion prosecution for pursuing goals legitimized by the federal labor laws.

The Sixth Circuit has also recently issued an opinion which, like the *Wilford* decision, improperly relies upon an evaluation of the "means" used to achieve "legitimate labor objectives" in finding a violation of the Hobbs Act. *United States* v. *Russo*, 708 F.2d 209 (6th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3190 (U.S. Sept. 3, 1983) (No. 83-368). Together, both *Wilford* and *Russo* represent a substantial departure from the decision of this Court in *Enmons* in an area that is likely to be the subject of recurring prosecutions.

ARGUMENT

I. A Court Cannot Find Labor Union Officials Guilty Of Violating The Hobbs Act, 18 U.S.C. § 1951, Without First Determining Whether The Goals Sought Were "Legitimate Labor Objectives"

In *Wilford*, the Eighth Circuit did not determine whether the Petitioners had a lawful claim to the property obtained. This issue was not decided because the Court specifically refused to determine if the union was pursuing legitimate labor objectives. Yet that determination must be made in a labor case in order to establish whether the Hobbs Act is applicable.

In *Enmons*, this Court construed the scope of the Hobbs Acts' coverage in the context of a labor dispute. The Defendants in *Enmons* were indicted for using violence, damaging company transformers and blowing up an electrical substation, to force the company to accede to collective bargaining demands for higher wages. 410 U.S. at 397-98. In that context this Court held that the word "wrongful" in the statutory definition of extortion "has meaning in the Act only if it limits the statute's coverage to those instances where the obtaining of property would itself be 'wrongful' because the alleged extortionist has no lawful claim to that property." *Id.* at 400. Specifically, with regard to labor relations, the Court concluded that "the Hobbs Act did not sweep within its reach violence during a strike to achieve legitimate collective-bargaining objectives." *Id.* at 404. This result attached even though the means used, damaging transformers and blowing up a substation, were clearly illegal.

The decision of the Eighth Circuit clearly exemplifies why this Court must intervene. The Court of Appeals specifically refused to determine "whether the defendants' asserted objectives [were] 'legitimate labor objectives.'" 710 F.2d at 444. Instead, the Court engaged in a review of the means used, the union's carding of drivers, to pur-

sue its legitimate labor objective. The union sought to pursue the legitimate and long-recognized objective of preserving the union wage scale from being undercut by the lower wages paid to non-union drivers. This legitimate union goal was attacked by the non-union drivers who attempted to perform work covered by the union collective bargaining agreement. The union's response was to organize and bring into the union these non-union drivers.

The Court failed to perform the crucial and fundamental task of determining if the Petitioners had a lawful claim to the property in issue. Thus, under the Eighth Circuit's view of *Enmons*, a fear of economic loss, occurring during the course of an organizing drive, can be the basis of a federal extortion prosecution despite the fact that organizing employees is a legitimate labor objective and unions have a lawful claim to the monies requested as dues.

In contrast, other Circuit Courts faced with Hobbs Act allegations in a labor relations setting have first isolated the objectives the parties were pursuing.[1] These Courts of Appeals have limited application of the Act to situations where the union agents were extracting property to which they had no lawful claim, such as obtaining personal payoffs or attempting to obtain financial payments, disguised as wages, for unwanted, imposed, or fictitious services. *United States* v. *Quinn*, 514 F.2d 1250, 1257 (5th Cir. 1975), *cert. denied*, 424 U.S. 955 (1976).

It should be noted, however, that the Sixth Circuit has recently joined the Eighth Circuit in holding that pursuit

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[1] The following cases applied the *Enmons* analysis regarding application of the Hobbs Act to illegitimate labor objectives. *United States* v. *Clemente*, 640 F.2d 1069 (2d Cir. 1981); *United States* v. *Arambasich*, 597 F.2d 609 (7th Cir. 1979); *United States* v. *Nell*, 570 F.2d 1251 (5th Cir. 1978); *United States* v. *Daley*, 564 F.2d 645 (2d Cir. 1977); *United States* v. *Jacobs*, 543 F.2d 18 (7th Cir. 1976), *cert. denied*, 431 U.S. 929 (1977).

of legitimate objectives by union and employer agents may be the subject of Hobbs Act prosecution. *United States* v. *Russo*, 708 F.2d 209 (6th Cir. 1983), *petition for cert. filed*, 52 U.S.L.W. 3190 (U.S. Sept. 3, 1983) (No. 83-368). The dissenting opinion in that case supports the instant Petitioners' suggestion that certiorari should be granted to properly limit the application of the Hobbs Act consistent with this Court's opinion in *Enmons*. *Id.* at 219-20.

II. Imposition Of Federal Criminal Penalties Under The Hobbs Act Will Inhibit Legitimate Union Activity

The decision of the Eighth Circuit [and Sixth Circuit in *U.S.* v. *Russo*] will have a chilling effect upon the right of union members to engage in activities to achieve legitimate labor goals. As has been previously recognized, utilization of the Hobbs Act to punish illegal acts intended to achieve legitimate union objectives would subject union members to penalties which are so severe as to significantly deter their willingness to exercise rights protected by the National Labor Relations Act. *United States* v. *Caldes*, 457 F.2d 74, 78 (9th Cir. 1972). It is inconceivable that Congress intended to create a labor relations system which protects an individual's right to engage in collective activity while subjecting the individual who exercises that right to criminal prosecution.[2]

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[2] The contention that the Congress did not intend the Hobbs Act to extend to misconduct committed in furtherance of a legitimate union objective is buttressed by recent bills seeking to legislate in this area. No fewer than four bills have been proposed which would have extended the federal criminal system by either revoking the Hobbs Act's exemption for activity which seeks a legitimate goal (S. 462, 98th Cong., 1st Sess. (1983)); (H.R. 450 and S. 613, 97th Cong., 1st Sess. (1981)) or by criminalizing "any act of violence or threat of violence in a labor dispute . . ." (H.R. 115, 97th Cong., 1st Sess. (1981)). Two additional bills sought to broaden the concept of "extortion" beyond its present Hobbs Act definition. (H.R. 1647 and S. 1630, 97th Cong., 1st Sess. (1981)).

In recognition of the special attention paid by Congress to the labor-management system, this Court has established that the federal government cannot extend its criminal jurisdiction to assume responsibility for policing the conduct of labor disputes absent a clear statement of Congressional intent. *United States* v. *Enmons*, *supra*, 410 U.S. at 411. See *United States* v. *DeLaurentis*, 491 F.2d 208 (2d Cir. 1974). Even in the application of criminal statutes, the unique status of labor matters has been acknowledged. *United States* v. *Cerilli*, 603 F.2d 415, 419 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). That sensitivity merits application here since the adverse consequences on the labor relations system of utilizing the Hobbs Act to reach acts intended to achieve legitimate objectives are similar to those considered by the Court in *Enmons*.[3]

Specifically, the severe penalties imposed for violating the Hobbs Act (twenty years in prison or a $10,000 fine or both) would diminish the exercise of an individual's federally protected rights. Congress has specifically legislated criminal penalties for union misconduct. See, e.g., 29 U.S.C. § 530. The traditional method of dealing with industrial misconduct has been to permit the National Labor Relations Board to fashion remedies which are appropriate for the particular circumstances. *United States* v. *DeLaurentis*, *supra*, 491 F.2d at 213 and n. 15. In fashioning those remedies, the National Labor Relations Board has consistently recognized the adverse impact on the exercise of protected concerted activities of awards of monetary damages against unions. *Union de Tronquistas*,

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[3] This court recently reemphasized the fact that "[t]he National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.*, addresses in great detail the relationship between employer, employee and union in a great variety of situations" concluding that "it would be an unsettling event [to scrutinize] strike and picket-line, violence . . . in the light of the strictures of § 1985(3)". *United Bhd. of Carpenters, Local 610* v. *Scott*, —— U.S. ——, 51 U.S.L.W. 5173, 5177 (U.S. July 5, 1983) (No. 82-486).

Local 901, 202 N.L.R.B. 399, 400 (1973). Similar considerations have led this Court to preclude imposition of punitive damages upon unions for errors committed in exercising their statutory obligation to represent their members, *Electrical Workers* v. *Foust*, 442 U.S. 42 (1979), as well as a wide variety of other circumstances. *Id.* at 52.

Clearly, the threat of the imposition of the severe criminal sanctions provided by the Act in this case would interfere with the policies and activities protected by the National Labor Relations Act to a far greater extent than the monetary penalties eschewed by the Board and this Court. Moreover, these criminal sanctions would clearly chill the exercise of rights guaranteed by Sections 7 and 13 [4] of the Act.

CONCLUSION

For the reasons stated herein, as well as those previously given by Petitioners, it is urged that the petition for certiorari be granted and the decision of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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[4] 29 U.S.C. §§ 157, 163.